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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001961-MR

CRAIG T. SMITH — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 09-CI-000399

ALLSTATE INSURANCE COMPANY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

WINE, JUDGE: Craig Smith appeals from a summary judgment of the Jefferson Circuit Court holding that his policy of insurance through Allstate Insurance Company ("Allstate") did not provide for underinsured motorist (UIM) coverage. On appeal, Smith contends that the policy provided for UIM coverage, and in the

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

alternative, that Allstate had a duty to inform him if the policy did not include UIM coverage.

History

Smith held two automobile insurance policies with Allstate and had held those policies for thirty-two years. On March 16, 2006, Smith was involved in a motor vehicle accident which was the sole fault of the other driver. The other driver's liability insurance carrier, Safe Auto Insurance Company ("Safe Auto"), paid its policy limits of $25,000 to settle Smith's claim against its insured. However, this sum was insufficient to cover Mr. Smith's injuries from the accident. After settling his claim with Safe Auto, Smith made a claim for UIM benefits under his policy of insurance with Allstate. Allstate denied Smith's claim for UIM benefits on the grounds that Smith's policy did not provide for UIM benefits.

Smith filed claims for breach of contract, for a declaration of rights, and for bad faith and punitive damages. All of these claims rested upon Smith's assertion that UIM coverage *was* or *should have been* provided under his Allstate policy. Allstate filed a counterclaim for a declaration of rights. Upon Allstate's motion, the trial court bifurcated the bad faith and punitive damages claims and placed them in abeyance.

Both parties filed cross-motions for summary judgment. The Jefferson Circuit Court denied Smith's motion for summary judgment and granted Allstate's motion for summary judgment on the ground that UIM coverage was not

included in Smith's policy at the time of the accident. Thus, the court held that Allstate was not contractually obligated to pay UIM benefits to Smith. Smith now appeals the summary judgment of the Jefferson Circuit Court.

Standard of Review

It is well-established that the proper interpretation of an insurance contract is a matter of law to be decided by the Court. *See, e.g. Hugenberg v. West American Ins. Co./Ohio Cas. Group*, 249 S.W.3d 174, 185 (Ky. App. 2006). As such, our review is *de novo*. *Lynch v. Claims Management Corp.*, 306 S.W.3d 93, 96 (Ky. App. 2010). In addition, when reviewing the grant of summary judgment by a trial court, we must determine whether the trial court correctly determined that there were no genuine issues of material fact in dispute. *Scrifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). As findings of fact are not at issue in this case, the trial court's decision is entitled to no deference. *Schmidt v. Leppert*, 214 S.W.3d 309, 311 (Ky. 2007).

Analysis

Smith's principal arguments on appeal are (1) that the Allstate policy unambiguously provided for UIM coverage; or (2), in the alternative, that the Allstate policy was ambiguous concerning UIM coverage and thus must be construed against Allstate; or (3) that Allstate had a duty to advise him of the availability of UIM coverage and Allstate breached that duty.

We first address Smith's contention that the Allstate policy unambiguously provided for UIM coverage. The Allstate policy begins with a

"declarations" page which sets out the premiums for each coverage. There is a provision on the second page of the policy which reads that "[a] coverage applies only when a premium for it is shown on the declarations page." The declarations page to Smith's policy lists a premium for each of two vehicles, and another premium amount entitled "Premium for Additional Coverages."

In the section of the policy entitled "Additional Coverage," the additional coverages for which Smith paid a premium are listed. The two additional coverages listed are "Uninsured Motorists" (UM) and "Bodily Injury." "Underinsured Motorists" (UIM) was not an additional coverage listed for which Smith paid a premium.

In "Part V" of the insurance policy, UIM coverage is defined for the policyholder. It is clearly stated in "Part V" that "[a]n uninsured auto is not . . . an underinsured motor vehicle." It is also stated in "Part V" that "[a]n underinsured auto is not . . . an uninsured motor vehicle." Given all of these factors, this Court cannot say that the policy unambiguously provided for UIM coverage.

We next consider Smith's contention that the Allstate policy was ambiguous as to whether UIM coverage was included, and thus, must be construed against Allstate. Smith argues that because of the placement of the definitions and various descriptions within the policy, policyholders could be led to believe that "underinsured vehicles" were covered under the overarching category of "uninsured vehicles."

When determining whether a term or terms in an insurance contract are ambiguous, we apply the "reasonable expectations doctrine," which mandates that ambiguous terms in a policy of insurance must be interpreted in favor of the insured's reasonable expectations and construed as an average person would construe them. *True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003). However, "[o]nly actual ambiguities, not fanciful ones, will trigger application of the doctrine." *Id.* Absent any ambiguity in the insurance contract, the contract shall be construed according to its "plain and ordinary meaning." *Nationwide Mutual Insurance Co. v. Nolan*, 10 S.W.3d 129, 131-2 (Ky. 1999).

Smith notes that UIM insurance is first described in "Section B" under "Part V" of the Allstate Policy. He also points out that "Section B" begins with the statement "We will pay damages because of bodily injury which an insured person is legally entitled to recover from the owner or operator of an underinsured auto," but that "Section B" does not include a statement or suggestion at any point that an *additional premium* must be paid in order to receive UIM coverage. He further states that UIM coverage is listed "immediately under" UM coverage in "Part V" of the policy, giving the impression to the average layperson that the two coverages are connected.

However, we do not find that this language or presentation presents an "actual ambiguity." Rather, the average person would not construe the policy of insurance here as extending UIM benefits. Instead, it seems clear from the declarations page that only UM benefits were paid for and covered under the

policy. This Court finds that the average layperson would not confuse UIM benefits and UM benefits where the policy, as here, explicitly defines UM benefits and states that UIM benefits are not covered by UM insurance. Accordingly, we find that the policy is not ambiguous in this regard as there are not two reasonable interpretations of the coverage provided. *New Life Cleaners v. Tuttle*, 292 S.W.3d 318 (Ky. App. 2009).

Finally, we address Smith's contention that his Allstate agent had a duty to advise him of the availability of UIM coverage because of Kentucky Revised Statute ("KRS") 304.20-040(13) and because of his course of dealing with Allstate over the preceding thirty-two years. Smith argues that Allstate breached this duty by failing to advise him that UIM coverage was available but was not provided under his policy.

In *Mullins v. Commonwealth Life Ins. Co*., 839 S.W.2d 245 (Ky. 1992), the Supreme Court addressed the issue of whether an insurer owed a duty to an insured to advise of the need for (and availability of) UIM coverage. The *Mullins* Court recognized that, generally, there is no affirmative duty of an insurer to advise an insured of same by virtue of the agency relationship alone.

> The fact that UIM coverage is optional, is reemphasized when comparing the language found in KRS 304.39-320, with language found in both KRS 304.39-030(1), a statute covering basic reparations benefits, with language found in KRS 304.39-110, a statute covering tort liability. KRS 304.39-030(1) provides in part that "every person suffering loss from an injury arising out of maintenance or use of a motor vehicle *has a right to basic reparations benefits*." (Emphasis added.)

> Likewise, KRS 304.39-110(1) reads in part, "*[t]he requirement* of security for payment of tort liabilities ..." (Emphasis added.) "The legislature obviously could have made [UIM] coverage mandatory [as it did in KRS 304.20-020(1), KRS 304.39-030, and KRS 304.39-110], but elected to require it to be furnished only "upon request." *Flowers v. Wells*, supra, at 181.
>
> Added RB are similarly optional. Language in the applicable statute, KRS 304.39-140(1), mirrors that found in KRS 304.39-320, for it provides,
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> each reparation obligor of the owner of a vehicle required to be registered in this Commonwealth shall, *upon request of a reparation insured*, be required to provide added reparation benefits for economic loss in units of ten thousand dollars ($10,000) per person.... (Emphasis added.)
>
> Thus, added RB are statutorily optional and not mandatory, based upon reasoning we previously applied when determining if UIM coverage was mandatory, pursuant to KRS 304.39-320.

Id. at 248.

However, that Court suggested that there may be an implied assumption of duty where: (1) the insured paid an insurance agent consideration beyond the mere payment of the insurance premium, (2) there was a course of dealing between the insurer and insured over such a period of time which would put a reasonable insurance agent on notice that his advice was being sought and relied upon, or (3) the insured clearly makes a request for advice from the Insurer or agent. *Id*. The *Mullins* Court found no course of dealing or additional payment to the agent which would justify the imposition of a duty by the courts. *Id*.

We now consider whether there was an implied assumption of duty in the present case by applying the test set forth in *Mullins, supra*. As Smith has not alleged that he paid his Allstate agent any consideration beyond the payment of his premium, we may limit our discussion to the second two prongs of this analysis.

Smith asserts that he had a course of dealing with Allstate over a thirty-two year period which should have alerted Allstate that its advice was being sought. Smith contends that he had a long course of dealing with his Allstate agents, as he was only assigned three individual agents over the course of thirty-two years. Smith testified in his deposition that he relied upon his Allstate agents and considered them to be experts. He placed all of his insurance with Allstate, including his cars, home, rental properties, and his umbrella insurance policy. He contends that the thirty-two year long relationship, coupled with his conversations with his agents over the years about increasing coverage, resulted in the assumption of duty on Allstate's part. Smith contends that this duty was breached when Allstate failed to advise him that he did not have UIM coverage, or that such coverage was available.

However, as our courts have previously stated, mere requests for "full coverage" or a "good policy" are not sufficient to constitute a request for advice on UIM coverage. *Id*. at 249. The mere fact that Smith sought to be "fully covered" or that his agent assured him that he was "fully covered" is not grounds for an implied assumption of duty in the UIM context. *Id*. Moreover, as Smith paid no

additional fees for the service of his agent and can point to no other factor which would otherwise indicate an assumption of duty by Allstate or its agents, we do not find that such a duty was impliedly assumed.

In contrast to a judicially imposed duty, as described above, the *Mullins* Court also noted that the General Assembly may impose statutory duties to advise upon insurers. *Id*. Indeed, the Court noted that the Legislature had imposed such a duty upon insurance companies by enacting KRS 304.20-040(13)[2]. This statute places a duty upon insurers to advise an insured of the availability of UIM coverage in the first notice of renewal of a policy of insurance.[3]

> KRS 304.20-040(13) provides that,
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> Except where the maximum limits of coverage have been purchased, every notice of first renewal shall include a provision or be accompanied by a notice stating in substance that added uninsured motorists, underinsured motorists, and personal injury protection coverages may be purchased by the insured.

Id. However, in *Mullins*, the cause of action in the case had accrued before the enactment of KRS 304.20-040(12) and, thus, the Court found the statute inapplicable.

In the present case, as the cause of action did not arise until 2006, it is quite clear that KRS 304.20-040(13) *is* applicable. Thus, in addition to considering

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[2] At the time of *Mullins, supra*, the relevant statutory provision was KRS 304.20-040(12). However, that section has since been changed to KRS 304.20-040(13).

[3] Of course, under KRS 304.39-320(2), Insurers in the State of Kentucky are already required to make UIM available to an insured upon request. Smith does not contend that he ever specifically requested UIM coverage, however.

whether a duty may be imposed judicially in this case, we also consider whether Allstate breached its legislatively imposed duty under KRS 304.20-040(13).

KRS 304.20-040(13) imposes upon insurers to advise an insured of the availability of UIM coverage in the policy's "first notice of renewal." Allstate contends that because the statute's 1990 amendment postdates the effective date of the *original* policy of insurance it extended to Smith (some thirty-two years before this action arose), the statute is inapplicable. However, Smith contends that to interpret KRS 304.20-040(13) as Allstate does would turn the purpose of the statute "on its head." We agree.

We find that to interpret the statute in such a way as would relieve Allstate from having to provide notice to an insured so long as the original policy was over twenty years old would defeat the intent and spirit behind the statute. More importantly, Allstate's position is not supported by case law. To be sure, in *Mullins, supra*, the Court did not say that KRS 304.20-040(13) was inapplicable because the policy of insurance in that case *predated* the statute, but rather because the "cause of action" arose after the enactment of KRS 304.20-040(13). *Id*. at 249-50. The "cause of action" in an automobile collision case arises from the collision and subsequent injury and does not accrue from the date of the original insurance policy.[4] Moreover, Allstate's own argument in its brief contradicts such an interpretation, as Allstate clearly states:

[4] If this Court were to entertain the reading that Allstate proffers, it would lead to the absurd conclusion that Smith's cause of action accrued over thirty-two years ago when his policy of insurance was first extended --despite the fact that the automobile collision giving rise to this case did not occur until 2006.

> It is well established that each policy renewal terminates the applicable contract of insurance with the end of a policy period, *and an entirely new and separate contract is formed, which replaces the old in every respect...*

(Appellee's Brief at 17, *citing MFA Mut. Ins. Co. v. Black*, 441 S.W.2d 134, 135-6 (Ky. 1969) (Emphasis added.)). In the present case, Allstate has made no argument that it ever gave Smith notice that UIM coverage could be purchased for an additional premium. Thus, we find that there is a genuine issue of material fact as to whether Allstate breached its duty as imposed by KRS 304.20-040(13) to notify Smith that his policy did not include UIM coverage, but that such coverage could be purchased for an additional premium.

Accordingly, we reverse and remand to the Jefferson Circuit Court.

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